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ABSTRACT

Instead of relying on national copyright law, surrounding case law, international treaties, and prevailing practice to govern information transactions for electronic information, copyright holders have turned to contracts (or licenses as they are more commonly called in the library world) as the mechanism for defining the owner, user, and uses of any given piece of information. The phenomenon of institutional licensing for electronic content has evolved in a short time. By the late '80s, libraries began to purchase shrinkwrapped ("pre-licensed") content. Concurrently, a number of indexing and abstracting services offered electronic versions directly to libraries via CD-ROM or through dial-up, and it was at this point, within the last 10 years, that library licenses gradually became recognized as a means to a new and different sort of information acquisition or access. Complaints about terms of licenses began to be (and continue to be) many. Some notable challenges of the library licensing environment today are in the following areas: terms of use; scalability; price; the liability-trust conundrum; the aggregator aggravation; the challenge of consortial dealings; and institutional workflow restructuring. On the positive side, both individual libraries and consortia of libraries have reported negotiating electronic content licenses with a number of publishers who have been particularly understanding of research library needs. (AEF)

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The Transition to Electronic Content Licensing
The Institutional Context in 1997

Scholarly Communication and Technology Conference
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Introduction

The public discourse about electronic publishing, as heard at scholarly and library gatherings about the topic of scholarly communications, has changed little over the last several years. Librarians and academics fret about the serials crisis, argue about the influence of commercial off-shore publishers, wonder when the academic reward system will begin to take electronic publications into account, and debate what steps to take to rationalize copyright policy in our institutions. There is progress in that a wider community now comes together to ponder these familiar themes, but to those of us who have been party to the dialog for some years, the tedium of ritual sometimes sets in.

At Yale, subject-specialist librarians talk to real publishers every day about the terms on which the Library will acquire their electronic products: reference works, abstracts, data, journals, and other full-text offerings. Every week, or several times a week, we are swept up in negotiating the terms of licenses with producers whose works are needed by our students and faculty. In 1997, electronic publications are a vital part of libraries' business and services. For example, at a NorthEast Research Libraries Consortium (NERL) meeting in February, each of the 13 research library representatives at the table stated that its library is expending about 6-7% of its acquisitions budget on electronic resources.

This essay will offer some observations on the overall progress of library licensing negotiations. But the main point of the will be to make this case: in the real world of libraries, we have begun to move past the predictable, ritual discourse. The market has brought librarians and publishers together; the parties are discovering where their interests mesh; and they are beginning to build a new set of arrangements that meet needs both for access (on the part of the institution) and remuneration (on the part of the producer). Even though the prices for electronic resources are becoming a major concern, libraries are able to secure crucial and significant use terms via site licenses, terms that often allow the customer's students, faculty, and scholars significant copying latitude for their work (including articles for reserves and coursepacks), at times more than what permitted via the fair use and library provisions in the Copyright Act of the U.S. In short, institutions and publishers are as or more advanced in making a digital market than perhaps they realize and more advanced than they are with resolving a number of critical technological issues.[1]

Why do Contracts or Licenses (Rather Than Copyright) Govern Electronic Content?

Society now faces what seems to be a powerful competitor for copyright's influence over the marketplace of cultural products, one that carries its own assumptions about what intellectual property is, how it is to be used, how it can be controlled, and what economic order can emerge as a result.

For convenience's sake, the codification of intellectual property is assigned to the early eighteenth century.

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That is when the evolving notion of copyright was enacted into law, shaping a marketplace for cultural products unlike any seen before. In that 18th century form, copyright legislation depended in three ways on the technologies of the time.

- First, the power of copyright was already being affirmed through the development of high-speed printing presses that increased the printer's at-risk capital investment and greatly multiplied the number of copies of a given original that could be produced (and thus lowered the selling price).
- Thus an author could begin to realize financial rewards through signing over copyright to a publisher. Owning the copyright meant that the publisher who had assumed the expense and risk of publication stood to gain a substantial portion of the publication revenue.
- Third, punishment for breaking the law (i.e., printing illegal copies) was feasible, for the ability to escape detection was relatively slight. The visibility and the capital costs of establishing and operating a printing press meant that those who used such presses to violate copyright were liable to confiscatory punishment at least commensurate with the injury done by the crime itself.

In the 1970s, technology advances produced the photocopier, an invention that empowered the user to produce multiple copies cheaply and comparatively unnoticed. In the 80s, the fax machine took the world by storm, multiplying copies and speeding up their distribution. Computer networking technology of the 90s marries the convenience, affordability, and ease of distribution, eclipsing the power of all previous technologies. We can attribute the exponential increase in electronic content, at least indirectly, to the current inhabitants of the White House. The Clinton-Gore campaign of 1992 placed the Internet before the general public and this administration has been passionately committed to rapid development of the National Information Infrastructure (NII) and determined to advance the electronic marketplace. Part of that commitment arises from national leader's unwavering faith that electronic networks create an environment and a set of instruments vital to the overall economic growth of the United States.

While copyright (that is, the notion that creative works can be owned) is still and probably always will be recognized as a fundamental principle by most players in the information chain, many believe that its currently articulated "rules" do not effectively address either the technical capabilities or reader needs of a high-speed information distribution age. And while it could be argued (and many educators do) that the 19th and 20th century drafters of copyright law intended to lay down societally-beneficial, and by extension technologically-neutral, principles about intellectual property ownership and copying,[2] in fact Thomas Jefferson knew nothing of photocopiers and the legislators who crafted the 1976 Copyright Act of the United States knew nothing of computer networks. There is a case to be made that, had they even begun to imagine such things, the law might have been written differently -- and that in fact it should now be written differently.[3] So, the gulf between copyright laws or treaties and the universe that those laws ought to address today, feels to many vast and deep. Therefore, instead of relying on national copyright law, surrounding case law, international treaties, and prevailing practice to govern information transactions for electronic information, copyright holders have turned to contracts (or licenses as they are more commonly called in the library world) as the mechanism for defining the owner, user, and uses of any given piece of information.

That is, the license-contract is invoked because the prospective deal is a substantial (in cash or consequence) transaction for both parties, feels like new kind of marketplace (or a market for a new kind of product) , and neither the selling or buying party is sure either of the other or of their position vis a vis the law or the courts. Publishers come to the table with real anxieties that their products may be abused by promiscuous reproduction of a sort that ultimately saps their product's marketability, while libraries are fearful that restrictions on permitted uses will mean less usable or more expensive products.

In short, what licensing agreements have in common with the copyright regime is that both accept the

fundamental idea of the nature of intellectual property -- that even when intangible, it can be owned. Where they differ is in the vehicle by which they seek to balance creators, producers, and users rights and to regulate the economy that springs up around them. Copyright represents a set of general regulations negotiated through statutory enactment. Licenses on the other hand represent a market-driven approach to this regulation, through deals struck between buyers and sellers.

When Did This Mode of Doing Business Begin for Libraries?

The concept of a license is old and fundamentally transparent. A license is essentially a means of providing use of a piece of property without giving up the ownership. For example, if one owns a piece of property and allows another to use it without transferring title, one may by law of contract stipulate the conditions one chooses; if the other party agrees to them, then a mutually agreeable deal has come into being. A similar transaction takes place in the case of performance rights for films and recordings. In such an example, we move from the tangible property mode of real estate where exclusive licenses (granting of rights to only one user) are common, to the intangible property mode of intellectual property such as copyright -- where non-exclusive licenses are the norm. The owner of a movie theater rarely owns the cans of film delivered weekly to the cinema, holding them instead under strict conditions of use: so many showings, so much payment for each ticket sold, etc. As with the economic relationship between author and publisher that is sanctioned by copyright, with the right price such an arrangement can be extraordinarily fruitful. In the license mode of doing business (precisely defined by the legal contract that describes the license) the relationships are driven entirely by contract law: the owner of a piece of property is free to ask whatever price and set whatever conditions on use the market will bear. The ensuing deal is pure "marketplace": a meeting of minds between a willing buyer and a willing seller.

A crucial point here is that where the owner of the property has a copyright-protected monopoly, the license becomes a particularly powerful tool for that owner.

Most of academics began to be parties to license agreements when personal computer software (*WordStar, WordPerfect*) appeared in the 1980s in shrinkwrap packages for the first time. Purchasers of such software may have read the fine print on the wrapper detailing the terms and conditions of use, but for the most part they either did not or have ceased to do so. The thrust of such documents is simple: by opening the package, the purchaser has agreed to certain terms, terms that include limited rights of ownership and use of the item paid for. In many ways, this mode of licensing raises problematic questions,[4] but in others such as sheer efficiency, it suggests the kind of transaction that the scholarly information marketplace needs to achieve. It is noteworthy that the shrinkwrap license has moved easily into the World Wide Web environment, where it shows itself in clickable "I agree" form. The user's click supposedly affirms that he or she has said yes to the user terms and is ready to abide by them. The downsides and benefits are similar to those of shrinkwrapped software.

The phenomenon of institutional licensing for electronic content has evolved in a short time. Over the last 20 years or so, licensing software has become a way of life for institutions of higher education. These kinds of licenses are generally for systems such as those that run institutional computers or online catalogs or software packages (e.g., for instruction, office support). The licenses, often substantial in scale and price, are arranged by institutional counsel (an increasingly overworked segment of an educational institution's professional staff) along with information technology managers.

Libraries' entree into this arena has been comparatively recent and initially on a small scale. In fact, the initial library business encounter with electronic content may not have happened via license at all, but rather via deposit account. Some 20 years ago, academic and research libraries began accessing electronic information, at that time primarily through mediated searching of indexing and abstracting services through consolidators

such as Dialog. Different database owners levied different per-hour charges (each database also required its own searching vocabularies and strategies), and Dialog (in this example) aggregated them for the educational customer. For the most part, libraries established accounts to which these (usually mediated by librarians or information specialists) searches were charged.

By the late 80s, libraries also began to purchase shrinkwrapped ("pre-licensed") content, though shrinkwrapped purchases did not form -- and still do not -- any very visible part of library transactions. Concurrently, a number of indexing and abstracting services offered electronic versions directly to libraries via CD-ROM or through dial-up (for example, an important early player in this arena was ISI, the Institute for Scientific Information), and it was at this point, within the last ten years, that library licenses gradually became recognized as a means to a new and different sort of information acquisition or access. Such licenses were often arranged by library subject specialists for important resources in well-defined areas of use. The license terms offered to libraries were accepted or not, the library customer regarding them mostly as non-negotiable. Non-acceptance was more often than not a matter of affordability, and there seemed to be little room for the library customer to affect the terms. Complaints about terms of licenses began to be (and persist in being) legion, for important reasons such as:

- *Potential loss of knowledge.* By definition, licenses are arranged for specific periods of time. At the end of that time, librarians rapidly discovered, if the license is not renewed, prior investment can become worthless as the access ceases (for example, a CD-ROM must be returned or perhaps it stops being able to read the information; connections to a remote server are severed).
- *License restrictions on use and users.* Institutions are often asked to assure that only members of the institution can use electronic information, in order to reduce or curtail its leakage.
- *Limitations on users' rights.* Initial license language not infrequently asks that institutional users severely limit what and how much they may copy from the information resource and may prescribe the means by which such copying can be done.
- *Cost.* In general, electronic licenses for indexing and abstracting services appeared, and still appear, to cost significantly more than print equivalents.[5]

What Has Happened to Increase Libraries' Awareness of Licenses?

1. *Sheer numbers.* Whatever their marketplace insecurities may be, thousands of information providers have jumped into the scholarly marketplace with electronic products of one sort or another: CDs, online databases, full text resources, multi-media. Many learned societies, scientific publishers, university presses, full-text publishers, vendor/aggregators, as well as new entrants to the publishing arena, now offer either beta or well-tested versions of either print-originating or completely electronic information. The numbers have ballooned in a short 2 to 3 years with no signs of abating. For example, *NewJour*, the online forum for announcing new e-journals, magazines and newsletters reports 3634 titles in its archive as of April 5, 1997, this without the 1100 science journal titles that Elsevier is now making available in electronic form.[6] The Yale University Library licenses over 400 electronic resources of varying sizes, types, media, and price and reviews about two new electronic content licenses a week.

2. *The attempt of various players in the information chain to create guidelines about electronic fair use, for example in the CONFU process[7] have not so far proved fruitful.* In connection with the Clinton Administration's National Information Infrastructure initiative, the Working Group on Intellectual Property Rights in the Electronic Environment called upon copyright stakeholders to negotiate guidelines for the fair use of electronic materials in a variety of nonprofit educational contexts. Anyone who wished to participate was invited to do so and a large group calling itself CONFU, the Conference on Fair Use, began to negotiate such guidelines for a variety of activities (such as library reserves, multimedia in the classroom, interlibrary loan, etc.) in September 1994. The interests of all participants in the information chain were represented, and

the group quickly began to come unstuck in reaching agreements on most of the dozen or more areas defined as needing guidelines. Such stalemates should come as no surprise; in fact, they are healthy and proper. Any changes to national guidelines, let alone national law or international treaty, should happen only when the public debate has been extensive and consensus can be reached. What many have come to realize during the current licensing activities is that the license arrangements that libraries currently are making, are in fact achieving legislation's business more quickly and by other means. Instead of waiting on Congress or CONFU and allowing terms to be dictated to both parties by law, publishers and institutions are starting to make their peace together, thoughtfully and responsibly, one step at a time. Crafting these agreements and relationships is altogether the most important achievement of the licensing environment.

3. *Numerous formal partnerships and informal dialogs have been spawned by capabilities of new publications technologies.* A number of libraries collaborate with the publishing and vendor communities as product developers or testers. Such relationships are fruitful in multiple ways. With regard to licensing, they encourage friction, pushback, and conversation that leads to positive and productive outcomes. Close to home, libraries have been offered -- and have greatly appreciated -- the opportunity to discuss at length the library licenses of various producers at this conference, JSTOR specifically, and libraries feel they have had the opportunity to shape and influence these with mutually satisfactory results.

4. *Library consortia have aggressively entered the content negotiating arena.* While library consortia have existed for decades, and one of their primary aims has been effective information sharing, it is only in the 90s (and mostly in the last 2 to 3 years) that a combination of additional state funding (for state-wide consortia), library demands, and producers' willingness to negotiate with multiple institutions have come together to make the consortial license an efficient and perhaps cost-effective way to manage access to large bodies of electronic content. An example of a particularly fruitful marketplace encounter (with beautiful as well as charged moments) occurred from February 3-5, 1997, as a group of consortial leaders, directors, and coordinators who communicate informally for a year or two through listserve messages, arranged a meeting at the University of Missouri-St. Louis. The Consortium of Consortia (COC, as we sweepingly named ourselves) invited a dozen major electronic content vendors to describe their products briefly and their consortial working arrangements in detail.[8] By every account, this encounter achieved an exceptional level of information-swapping, interaction, and understandings both of specific resources and of the needs of producers and customers. That said, the future of consortial licensing is no more certain than for individual library licenses, though for different reasons.[9]

5. *Academia's best legal talent offer invaluable support to libraries.* Libraries are indebted to the intelligent and outspoken lawyerly voices in institutions of higher learning in this country. The copyright specialists in universities' general counsel offices have in a number of cases led in negotiating content licenses for the institution and have shared their strategies and knowledge generously. Law school experts have published important articles, taught courses, contributed to internet postings, and participated in national task forces where such matters are discussed. [10]

6. *The library community has organized itself* to understand the licensing environment for its constituents. The Association of Research Libraries (ARL) has produced an introductory licensing brochure.[11] The Council on Library Resources/Commission on Preservation and Access has supported Yale Library's creation of an important WWW site about library content licensing,[12] and the Yale Library offers the library, publisher, vendor, and lawyer world a high-quality moderated online list where the issues of libraries and producers are aired daily.[13]

7. *There is no other way.* Licensing and contracts are the only way to do business right now for an increasing number of electronic information resources that Library users need for their education and research.

Some Notable Challenges of the Library Licensing Environment Today

I identify these because they are important and need to be addressed, treating this conference as a place to pose the questions in order that we may begin answering them.

1. *Terms of use.* This area needs to be mentioned at the outset, as it has caused some of the most anguished discussions between publishers and libraries. Initially, many publishers' contact language for electronic information was highly restrictive about both Permitted Users and Permitted Uses. Assumptions and requirements about how use ought to be contained have been at times ludicrous, for example, in phrases such as "no copies may be made by any means electronic or mechanical." Through dialog between librarians and producers, who are usually genuinely eager to market their work to happy customers, much of this language has disappeared from the first draft contracts presented to library customers. Where libraries are energetic and aggressive on behalf of their users, the terms of use can indeed be changed to facilitate educational and research goals. The Yale Library, for example, is now party to a number of licenses that permit substantial amounts of copying and downloading for individual learning, research, in-the-classroom learning, library reserves, coursepacks, and related activities. Interlibrary Loan and transmission of works to individual scholars in other organizations are matters that still need a great deal of work. However, the licenses of 1996 and 1997 represent significant all-around improvements and surely reinforce the feeling that rapid progress is being made.

2. *Scalability.* Institutional electronic content licenses are now generally regarded as negotiable, mostly because the library-customer side of the marketplace is now treating them as such (which publishers seem to welcome) and successes of different sorts have ensued (success being defined as a mutually agreeable contract), making all parties feel that they can work together effectively in this new mode. However, negotiations are labor-intensive. Negotiation requires time (to develop the expertise and to negotiate), and time is a major cost here. The current mode of one on one negotiations between libraries and their publishers seems at the moment necessary, for many reasons, and at the same time it places new demands on institutional staff. Scalability is the biggest challenge for the licensing environment.

- Clearly, it is too early to shift the burden onto intermediaries such as subscription agencies or other vendors who have vested interests of their own. So far their intervention has been absent or not particularly successful. In fact, in some of the situations where intermediaries purvey electronic databases, library customers secure less advantageous use terms than those libraries could obtain by licensing directly from the publishers. This is hardly surprising, as those vendors are securing commercial licenses from the producers, while libraries are able to obtain educational licenses. Thus, it is no surprise that in unveiling their latest electronic products and services, important organizations such as Blackwell's ("Navigator") and OCLC ("EJO - Electronic Journals On-line") leave license negotiating for the journal content as a matter between the individual journal publishers and their library customers.
- The contract that codifies the license terms is a pervasive document covering every aspect of the library/producer relationship, from authorized uses and users to technology base, duration, security mechanisms, price, liability, responsibility, etc. That is, the license describes the full dimensions of the "deal" for any resource. Attempts on the part of the library and educational community to draft general principles or models to address content licensing characteristically forget this important fact and the results inevitably fall short in the scaling-up efforts.

3. *Price.* Pricing models for electronic information are in their infancy; they tend to be creative, complicated and often hard to understand. [14] Some of these can models range from wacky to bizarre. Consortial pricing can be particularly complex. Each new model solves some of the equity or revenue problems associated with

earlier models but introduces confusion of its own. While pricing of electronic resources is not strictly speaking a problem with the license itself, price has been a major obstacle in making electronic agreements. The seemingly high price tags for certain electronic resources leave the "serials crisis" in the dust.[15] It is clear that academic libraries, particularly through their consortial negotiators, expect bulk pricing arrangements, sliding scales, early signing bonuses, and other financial inducements that publishers may not necessarily feel they are able to offer. Some of the most fraught moments at the St. Louis COC meeting involved clashes between consortial representatives who affirmed that products should be priced at whatever a willing buyer can or will pay, even if this means widely inconsistent pricing by the vendor, and producers who affirmed the need to stick with a set price that enables them to meet their business plan.

4. *The Liability-Trust Conundrum.* One of the most vexing issues for producers and their licensees has been the producer's assumption that institutions can and ought to vouch for the behavior of individual users (in licenses the sections that deal with this matter are usually called Authorized or Permitted Users and what Users may do under the terms of a license is called an Authorized or Permitted Use) and that individual users' abuses of the terms of a license can, in fact, kill the deal for a library or a whole group of libraries. Working through this matter with provider after provider in a partnership/cooperative approach poses many challenges. In fact, this matter may be a microcosm of a larger issue: the development of the kind of trust that must underlie any electronic content license. Generally the marketplace for goods is not thought of in terms of trust; it regarded as a cold-cash (or virtual cash) transaction environment. Yet the kinds of scaled-up scholarly information licenses that libraries are engaging with now depend on mutual understanding and trust in a way not needed for the standard trade -- or even the print -- market to work. In negotiating electronic content licenses, publishers must trust -- and, given the opening up of user/use language, it seems they are coming to trust -- their library customers to live up to the terms of the deal.

In part, we currently rely on licenses because publishers do not trust users to respect their property and because libraries are fretful that publishers will seek to use the new media to tilt the economic balance in their favor. Both fears are probably overplayed. If libraries continue to find, as they are beginning to do, that publishers are willing to give *the same or even more* copying rights via licenses as copyright offers, both parties may not be far from discovering that fears have abated, trust has grown, and the ability to go revert to copyright the primary assurance of trust can therefore increase. But many further technological winds must blow -- for example the cybercash facility to allow micropayment transactions -- before the players may be ready to settle down to such a new equilibrium.

5. *The Aggregator Aggravation (and Opportunity).* The costly technological investments that producers need to make to move their publications onto an electronic base; the publishing processes that are being massively re-conceived and reorganized; and not least, the compelling vision of digital libraries that proffer information to the end user through a single or small number of interfaces, with a single or modest number of search engines, gives rise to information aggregators of many sorts: [16] those who develop important searching, indexing, and/or display softwares (AltaVista, OpenText, etc.); those who provide an interface or gateway to products (Blackwell, etc.), and those who do all that plus offer to deliver the information (DIALOG@CARL, OCLC, etc.). Few publishers convert or create just one journal or publication in an electronic format. From the viewpoint of academic research libraries, it appears that the electronic environment has the effect of shifting transaction emphasis from single titles to collections or aggregations of electronic materials as marketplace products.

In turn, licensing collections from aggregators makes libraries dependent on publishers and vendors for services in a brand new way. That is, libraries' original expectation for electronic publications, no more than five years ago, was that publishers would provide the data and the subscribing library or groups of libraries would mount and make content available. But mounting and integrating electronic information requires a great deal of capital, effort, and technological sophistication, as well as multiple licenses for software and

content. Thus, the prognosis for institutions meeting all or most of their users' electronic information needs locally is slim. The currently emerging mode, thus, takes us to a very different world in which publishers have positioned themselves to be the electronic information providers of the moment.[17]

The electronic collections offered to the academic library marketplace are frequently not in configurations librarians would have chosen for their institutions, had these resources been unbundled. This has been an issue in several of Yale Library's negotiations. Say that the publisher of a large number of quality journals makes only the full collection available in e-form, and only through consortial sale. By this means, the Yale Library recently "added" 50 electronic journal titles to its cohort, titles it had not chosen to purchase in print. The pricing model did not include a cost for those additional 50 titles; it was simply easier for the publisher to include all titles than to exclude the less desirable ones. While this paper is not the place to explore this particular kind scaling up of commercial digital collections, I leave it as a topic of potentially great impact on the academic library world.

6. *The Challenge of Consortial Dealings.* Ideally, groups of libraries acting in consort to license electronic resources can negotiate powerfully for usage terms and prices with producers. In practice, both licensors and licensees have much to learn about how to this scaled up environment. Some of the particularly vexing issues, for example, include:

- Not all producers are willing to negotiate with all consortia; some are not able to negotiate with consortia at all.
- In the early days of making a consortial agreement, the libraries may not achieve any efficiencies because all of them (and their institutional counsel) may feel the need or desire to participate in the negotiating process. Thus, in fact, a license for 12 institutions may take nearly as long to negotiate as 12 separate licenses.
- Consortia overlap greatly, particularly with existing bodies such as cataloging and lending "utilities" offering consortial deals to their members. It seems that every library is in several consortia these days, and many of us are experiencing a "competition" for our business from several different consortia at once for a single product's license.
- No one is sure precisely what a consortial "good deal" comprises. That is, it is hard to define and measure success. The bases for comparison between individual institutional and multiple institutional prices are thin and the stated savings can often feel like a sales pitch.
- Small institutions are more likely to be unaffiliated with large or powerful institutions and left out of seemingly "good deals" secured by the larger, more prosperous libraries. Surprisingly enough, private schools can be at a disadvantage since they are generally not part of state-established and funded consortial groups.
- In fact, treating individual libraries differently to collectives may, in the long run, not be in the interests of publishers or those libraries.

7. *Institutional Workflow Restructuring.* How to absorb the additional licensing work (and create the necessary expertise) within educational institutions is a challenge. One can foresee a time when certain kinds of institutional licenses (electronic journals, for example) might offer fairly standard, signable language, for surely producers are in the same scaling-up bind that libraries are. At the moment, licenses are negotiated in various departments and offices of universities and libraries. Many universities require that license negotiation, or at least a review and signature, happen through the Office of General Counsel, and sometimes over the signature of the Purchasing Department. In such circumstances, the best result is delay; the worst is that the Library may not secure the terms it deems most important. Other institutions delegate the negotiating and signing to library officers who have an appropriate level of responsibility and accountability for this type of legal contract. Most likely the initial contact between the Library and the electronic provider occurs by the public service or collections librarians who are most interested in bringing

the resource to campus.

One way of sharing the workload is to make sure that all selector staff receive formal or informal training in the basics and purposes of electronic licenses, so that they can see the negotiations through as far as possible, leaving only the final review and approval to those with signing authority.[18] In some libraries, the licensing effort is coordinated from the Acquisitions or Serials Departments, the rationale being that this is where purchase orders are cut and funds released for payment. However, such an arrangement can have the effect of removing the publisher interaction from library staff best positioned to understand a given resource and the library readers who will be using it. Whatever the delegation of duties may be at any given institution, it is clear that the tasks must be carved out somewhere in a sensible fashion, for it will be a long time before the act of licensing electronic content becomes transparent. Clearly, this new means of working is not the "old" acquisitions model. How does everyone in an institution who should be involved in crafting licensing "deals" get a share of the action?

Succeeding (Not Just Coping)

On the positive side, both individual libraries and consortia of libraries have reported negotiating electronic content licenses with a number of publishers who have been particularly understanding of research library needs. In general, academic publishers are proving to be willing to give and take on license language and terms, provided that the licensees know what terms are important to them. In many cases, librarians ask that the publisher re-instate the "public good" clauses of the Copyright Act into the electronic content license, allowing fair use copying or downloading, interlibrary loan, and archiving for the institutional licensee and its customers. Consortial negotiations are having a highly positive impact on the usefulness and quality of licenses.

While several downsides to the rapidly growing licensing environment have been mentioned, the greatest difficulty at this point is caused by the proliferation of licenses that land on the desks of librarians, university counsel, and purchasing officers. The answers to this workload conundrum might lie in several directions.

1. *National or Association Support.* National organizations such as ARL and The Council on Library Resources are doing a great deal to educate as many as possible about licensing. Practising librarians treasure that support and ask that licensing continue to be part of strategic and funding plans. For example, the Yale Library has proposed next-step ideas for the World Wide Web Liblicense project and appreciate the Council's interest in them. Under discussion are such possibilities as: further development of a prototype licensing software that will enable librarians to create licenses on the fly, via the World Wide Web, for presentation to producers and vendors as a negotiating position[19] and assembling a working group meeting that involves publisher representatives in order to explore how many pieces of an academic electronic content are amenable to standardization. Clearly, academic libraries are working with the same producers to license the same core of products over and over again. It might be valuable for the ARL and other organizations to hire a negotiator to develop acceptable language for certain key producers, say the top 100, with the result that individual libraries would not need to work out this language numerous times. Pricing and technology issues, among others, might nonetheless need to remain as items for local negotiation.

2. *Aggregators.* As indicated above, as libraries, vendors, and producers become more skilled as aggregators, the scaling issues will abate somewhat. Three "aggregating" directions are emerging:

- Information Bundlers, such as Lexis-Nexis, OCLC, DIALOG@CARL, UMI, IAC, OVID, and a number of others offer large collections of materials to libraries under license. Some of these are sizeable take-it-or-leave-it groupings; others allow libraries to choose subsets or groups of titles.
- Subscription Agents are beginning to develop gateways to electronic resources and to offer to manage

libraries licensing needs.
- Consortial of Libraries can be considered as "aggregators" of library customers for publishers.

3. *Transactional Licensing.* This paper treats only institutional licenses, be they site licenses, simultaneous user/port licenses, or single-user types. An increasing number of library transactions demand rights clearance for a piece at a time (situations that involve, say, course reserves or provision of articles that are not held in the library through a document supplier such as CARL). Mechanisms for easy or automatic rights clearance are of surpassing importance and various entities are applying considerable energies to them. The academic library community has been skittish about embracing the services of rights management or licensing organizations, arguing that participation would abrogate fair use rights. It seems important, particularly in light of recent court decisions, that libraries pay close attention to their position vis a vis individual copies (when they are covered by fair use and when they are not, particularly in the electronic environment) and take the lead in crafting appropriate and fair arrangements to simplify the payment of fees in circumstances when such fees are necessary.[20]

Beyond the License?

As we have seen, the content license comes into play when the producer of an electronic resource seeks to define a "deal" and an income stream to support the creation and distribution of the content. Yet, other kinds of arrangements are possible.

1. *Unrestricted and For Free.* One hears in many venues of important resources funded up front by governments or institutions, say, and the resources are available to all end users. Some examples include the notable Los Alamos High Energy Physics Preprints; the various large genome databases; the recent announcement by the National Institutes of Health of MEDLINE availability online; and numerous university-based electronic scholarly journals or databases. A number of such important resources exist and their numbers are growing, though they may always be in the minority of scholarly resources. Characteristically, such information is widely accessible, the restrictions on use are minimal or non-existent, and license negotiations are largely irrelevant or very straightforward.

2. *For a Subscription Fee and Unrestricted to Subscribers.* Some producers are, in fact, charging an online subscription fee but licenses need not be crafted or signed. The terms of use are clearly stated and generous. The most significant and prominent example of such not-licensed but paid-for resources include the rapidly growing collection of high-impact scientific and medical society journals published by Stanford University's HighWire Press.[21]

Both of these trends are important; they bear watching and deserve to be nurtured. In the first case, the up front funding model seems to very well serve the needs of large scientific or academic communities without directly charging users or institutions; they are products of public- or university-funded research. In the second instance, although users are paying for access to the databases, the gap between the copyright and licensed way of doing business seems to have narrowed and in fact the HighWire publications are treated as if copyright-governed. Over time, it would not be unreasonable to expect this kind of merger of the two (copyright and contract) constructs and to benefit from the subsequent simplification the merger would bring.

In short, there is much still to be learned in the content licensing environment, but much has been learned already. We are in a period of experimentation and exploration. All the players have real fears about the security of their livelihood and mission; all are vulnerable to the risks of information in new technologies; many are learning to work together pragmatically towards at least mid-term modest solutions, in turn using those modest solutions as stepping stones into the future.

NOTES

1. Clifford Lynch in "Technology and its Implications for Serials Acquisitions," *Against the Grain* 9:1 (1997), pp. 31+. This is a version of a talk by Lynch at the November 1996 Charleston Conference. He identifies they key needs in building digital libraries as authentication, printing, individual item addressability, accessibility, and linkage. Lynch concludes with this insight: "The theme I want to underscore here is that we need to be very careful about whether we have technology that can deliver this electronic content *for which we are busy negotiating financial arrangements in acceptable ways on a broad systemic basis.*" [emphasis is mine]

2. The statement "Fair Use in the Electronic Age: Serving the Public Interest," is an outgrowth of discussions among a number of library associations regarding intellectual property, and in particular, the concern that the interests and rights of copyright owners and users remain balanced in the digital environment. This important position statement was developed by representatives of the following associations: American Association of Law Libraries, American Library Association, Association of Academic Health Sciences Library Directors, Association of Research Libraries, Medical Library Association Special Libraries Association. It espouses the philosophy that the US copyright law was created to advance societal goals and well-being and embeds the notion of technological neutrality. It can be found at: gopher://arl.cni.org:70/00/scomm/copyright/policy/uses.

3. Close to home, I have recently had the opportunity to read statements from the international publishing community in two major position papers originating with the International Publishers Copyright Council, the STM group of publishers, and the International Publishers Association.
These documents affirm the following kinds of things:

- Digital versions of works are not the same as print versions, because digital information can be manipulated and widely distributed. (The implication is that all of this will happen and that it is happening with copyrighted works, often in an illegal manner.)
- Digital versions of works need even more protection than printed versions.
- Digital browsing is not the same as reading print: the very act of browsing involves reproducing copies (which immediately implicates and possibly violates copyright law).
- There should be no private or personal exemptions from copyright in the digital environment.
- There should be no exceptional copyright treatment for libraries in the digital environment -- the exemptions for traditional materials, if carried over into the digital environment, will result in unfair competition with publishers.
- Digital lending (a digital analog to ILL) will destroy publishers.
- Publishers are now poised to offer and charge for electronic delivery of information and therefore they ought to be able to do this. Such services will replace most of the copying libraries and individuals used to do in print.
- The role of libraries will be to provide access, select materials for users via what they choose to license, instruct users in the vast array of electronic sources and how to use them; support them in searching and research and learning needs.

4. See the recent decision *ProCD v. Zeidenberg* In the United States Court of Appeals For the Seventh Circuit, June 30, 1996. The question posed was: Must buyers of computer software obey the terms of shrinkwrap licenses? The district court had said not. The 7th Circuit reversed this decision. ProCD (plaintiff) compiled information from 3,000+ phone directories into one database, with additional information such as zip code extensions) and with their own searching software. They packaged it as a CD for personal sale in a shrink-wrap box. They also sold it in other ways to commercial companies as mailing lists and so on. On the

basis that factual information cannot be copyrighted, Mr. Zeidenberg bought a package of SelectPhone (TM) at a shop in Madison WI. He formed a company to re-sell the information which he made available over the WWW apparently quite cheaply. Zeidenberg argued that one cannot be bound by the shrinkwrap license because the terms are not known at the time of purchase. They are inside the package and the purchaser cannot be bound by terms that are secret at time of purchase. The Judges' Decision was that the shrinkwrap license is legal and a buyer is bound by it. The full decision and rationale may be read at the following URL: http://www.sgpdlaw.com/cases/procd_op.html

5. See Martha Kellogg, "CD-ROM Products as Serials: Cost Considerations for Libraries," in *Serials Review* 17:3 (1991), pp. 49-60. Using the tables in this article as a basis of comparison between print reference or I&A works and their CD equivalents shows a difference of about 30% where resources are comparable. Recent e-mail from the University of Michigan Library suggests differentials between print and electronic as high as 60%.

6. *NewJour* is a joint project of the Yale Library, the University of Pennsylvania, and the UC San Diego Library. Its fully searchable archive is located at: http://gort.ucsd.edu/newjour/

7. A good summary of the flavor, debates, and progress of CONFU can be found at URL: http://www.utsystem.edu/OGC/IntellectualProperty/confu.htm The CONFU interim report is available at URL: http://www.uspto.gov/web/offices/dcom/olia/confu/

8. For a list of the consortia that participated in the St. Louis meeting and descriptions of their activities, see the COC home page maintained by Bonnie Turner, Senior Administrative Assistant at Yale University Library: http://www.library.yale.edu/ocshelve/

9. Ann Okerson, "Buy or Lease? Two Models for Scholarly Information at the End (or the Beginning) of an Era), *Daedalus* 125:4 (1996), pp. 55-76. This is the special issue on libraries called Books, Bricks, and Bytes. I suggest that one possible outcome of the new trend to scaled-up consortial licensing activities is that the library marketplace will gain significant power and that publishers of scholarly information could find themselves in quite a different position than the "captive" marketplace of today. It is possible to argue that such an outcome is very healthy; on the other hand, even librarians and scholars might find it undesirable in that it would put today's specialized scholarly publications, with their attendant high prices, out of business. It seems to me that such publications are already most at risk as commercial (i.e., "for sale") publications and that they offer a perfect opportunity for scholars, universities, and libraries to devise a different mode of publication and distribution. The *Daedalus* piece can also be found at the URL: http://www.library.yale.edu/~okerson/daedalus.html

10. For example, the University of Texas Office of General Counsel's Copyright Management Center's site is an especially rich resource. The Center provides guidance and information to faculty, staff and students concerning applicable law and the alternatives available to help accomplish educational objectives. A large number of materials are accessible through the Web site, organized by topic. Some important documents stored directly on the Web server. The principal author is Georgia Harper, Copyright Counsel for the University of Texas System. The URL is: http://www.utsystem.edu/ogc/intellectualproperty/cprtindx.htm. Among others, the higher education community is indebted to Indiana University's Kenneth Crews, an important voice in CONFU (see for example the CETUS Fair Use document at: http://www.cetus.org/fairindex.html); the University of North Carolina Law School's Lolly Gasaway, also a leader in CONFU and contributor of many important resources (see for example "When Works Pass Into the Public Domain" at URL: http://www.library.yale.edu/~okerson/pubdomain.html); and Karen Hersey of the MIT Counsel's Office, a leader in crafting university-producer electronic license agreements and a frequent workshop presenter on this topic.

11. See "Licensing Electronic Resources: Strategic and Practical Considerations for Signing Electronic Information Delivery Agreements" at URL: http://arl.cni.org/scomm/licensing/licbooklet.html

12. See LIBLICENSE: Licensing Digital Information -- A Resource for Librarians. This Web resource contains license vocabulary, licensing terms and descriptions, sample publishers licenses, links to other licensing sites, and a bibliography about the subject. The URL is: http://www.library.yale.edu/~llicense/index.shtml

13. LIBLICENSE-L is a moderated list for the discussion of issues related to the licensing of digital information by academic and research libraries. To join the Liblicense-l list, please do the following: Send a message to: listproc@pantheon.yale.edu Leave the subject line blank. In the body of the message, type: subscribe LIBLICENSE-L Firstname Lastname

14. A LIBLICENSE-L message of February 12, 1997, enumerated a dozen different pricing models for electronic resources, and correspondents added several more in subsequent discussion.

15. Several reasons are advanced for the higher cost of electronic resources over comparable print resources: (1) the producers are making new R&D and technology investments whose significant prices are passed on to the customer; (2) producers of journals generally offer a package which includes print plus electronic versions, giving the customer two different forms of the same information, rather than one only; (3) the functionality of e-resource is arguably higher than of the print version; (4) electronic resources are not marketed as single journals or books but as scaled-up collections, often of substantial heft (consider the corpora of humanities full texts marketed by Chadwyck-Healey, the large backfile collections of JSTOR, the full collection of Academic Press titles available under its IDEAL program: it seems that there is little incentive for producers to create and sell one electronic item at a time); and (5) in becoming the source or site or provider, the electronic information is taking on many of the library's roles and costs.

16. A LIBLICENSE-L message of March 14, 1997, defined aggregators in the following way: "Aggregation" as used on this list means the bundling together or gathering together of electronic information into electronic collections that are marketed as a package. For example, DIALOG@CARL aggregates 300 databases; Academic Press's IDEAL aggregates 170+ journals; Johns Hopkins's Project MUSE is an electronic collection of 40+ journals, and so on. But the term "aggregator" is more usually used in describing the supplier who assembles the offerings of more than one publisher, so one is more likely to hear Dialog, OCLC, Information Access, and UMI spoken of as aggregators, than The Johns Hopkins University Press.

17. License negotiations between libraries and producers now do take into account the matter of electronic archiving or at least the parties pay lip service to perpetual access. For example, it is common for an electronic resource license to offer some form of access or data if a the library cancels a license or if the provider goes out of business. However, while the license addresses this matter, the underlying solutions are far from satisfactory for either party. We leave the matter of archiving, a huge topic and concern, to other papers and venues; clearly the whole underpinnings of libraries and culture are at stake depending on the outcomes of the archiving dialogs that are in place now and will surely outlast our lifetimes.

18. At Yale, for example, after close discussions on this matter with the Library to make sure that points of view were in synch, General Counsel delegated library content licensing to senior library Administration and it is now done by the Associate University Librarian for Collections, with considerable support and backstopping by Yale's public services and collections librarians in effective and productive teamwork.

19. In fact, the software development was funded by the Council, now known as CLIR, in June 1997 and its product should be available on the WWW site by year end.

20. The case *Princeton University Press v. Michigan Document Services, INC.*, asked the question: does a copy shop infringe on publishers' copyrights when it photocopies coursepack materials? This material comprises book chapters and articles for students of nearby colleges and universities. The owner of MDS argued that he was copying on behalf of the students and exercising their fair use rights. The recent ruling on appeal in the Sixth Circuit was for the publishers. For extensive documentation on this matter, see Stanford's Fair Use site: http://fairuse.stanford.edu/mds/

21. For the journals available through Stanford's HighWire, see: http://highwire.stanford.edu.